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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 943

FOSTER BROWN,

Petitioner.

vs.

THE STATE OF TEXAS

PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF CRIMINAL APPEALS OF THE STATE
OF TEXAS

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To the Honorable Supreme Court of the United States:

Comes now Foster Brown, Petitioner, and respectfully presents this his petition for Writ of Certiorari to the Honorable Supreme Court of the United States, sitting at Washington, D. C., to review and correct errors of law committed by said Court of Criminal Appeals of the State of Texas, said court being the Court of highest resort in criminal cases in said State of Texas, in cause No. 23,395, on the Docket of said Court of Criminal Appeals, entitled *Foster Brown, Appellant v. The State of Texas*, Appellee, motion for rehearing having been overruled on the 23d, day of October, A. D. 1946, as shown at page 45 of Transcript of record from the Court of Criminal Appeals of Texas, the opinion of the said Court of Criminal

Appeals is shown at page 42-45 of Transcript on the motion for rehearing, and the opinion is shown at page 36-38 of said Transcript. On page 45-46 of said Transcript is shown Appellant's Motion for Stay of Mandate, and Order granting such Stay of Mandate.

Summary and Statement of the Matter Involved

Defendant Foster Brown was charged in this case with the offense of unlawfully selling an alcoholic beverage, to-wit, whiskey, to W. E. Russell, in Young County, Texas, same being a dry area under State Local Option Law; this cause is number 5790 on the Docket of said County Court of Young County, Texas; The Complaint and Information alleges two prior convictions for offenses of like character against this defendant; It alleges a final conviction in the case of the *State of Texas v. Foster Brown* on July 19th, 1943, in cause No. 5607, in the County Court of Young County, Texas, which is for illegal transportation of whiskey in Young County, a dry area; It further alleges a final conviction in the case of the *State of Texas v. Foster Brown* in cause number 5691, in the County Court of Young County, Texas, said conviction alleged to be September 5th, 1944, and said conviction is for possession of whiskey for the purpose of sale. This case was tried before a jury in the County Court of Young County, Texas, on a plea of not guilty. The Court charged the jury that the minimum penalty was a fine of \$400.00 and costs or a jail sentence not to exceed four years, or both such fine and jail sentence, this under Article #61 of the Texas Penal Code, which reads as follows: (If it be shown on the trial of a misdemeanor that the defendant has been once before convicted of the same offense he shall on a second conviction receive double the punishment prescribed for such offense in ordinary cases, and upon a third or any

subsequent conviction for the same offense, the punishment shall be increased so as not to exceed four times the penalty in ordinary cases), the penalty charged being four times the minimum and four times the maximum allowed by Statute for the offense for which this defendant was being tried. The trial resulted in a verdict of guilty and punishment assessed by the jury at a fine of \$400.00 and costs and a jail sentence of Ninety days. See Courts Charge at page 6 of the record on file herein; see the Original Complaint and Information in the trial court at page 1-4 of Transcript on file herein. Judgment was rendered and entered in accordance with said verdict; see page 10 of Transcript.

The defendant duly and timely filed his Motion for a New Trial Transcript page 11 and duly and timely filed an Amended Motion for a new trial in the trial court Transcript page 12, and on a hearing of his said First Amended Motion for a New Trial in the trial Court, which was regular and within the time prescribed by Statute he alleged as grounds for new trial that the cause number 5607, styled the *State of Texas v. Foster Brown*, had been used one time prior thereto to enhance the penalty in a criminal case against this defendant, to-wit, in cause number 5731, styled the *State of Texas v. Foster Brown*, in the County Court of Young County, Texas, and therefore could not be used again in this case to enhance the penalty against him, because it would be in violation of the principal of former jeopardy and also would be *res adjudicata*, ARTICLE V of the Constitution of the United States reading in part, "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb". Said motion duly set out that defendant's counsel did not represent defendant in the prior case and did not know of the prior

use of such old conviction to enhance the penalty in such prior case but learned of such fact after the main trial.

The Complaint and information in cause number 5731, and the judgment of conviction were introduced and proof made that such complaints and informations were read to defendant in said cause number 5731, who was the same Foster Brown as the defendant in the instant case, and in such Complaint and Information it alleged the prior conviction in cause number 5607 in said County Court of Young County, and the evidence on the hearing of the motion for new trial showed by the testimony of defendant Brown and by E. M. Remington Acting County Attorney who prosecuted the case at the time of the trial of No. 5731, that said Foster Brown was being held in jail by the Sheriff and that he was brought before the Court and the Complaint and Information read to him with such prior conviction alleged therein and that he plead thereto; that there were two counts in said Complaint and Information and that the Court read both counts to him and that the Court called for his plea on both counts and he entered a plea of guilty to both counts and the court then found him guilty on the first count and fined him and that he paid his fine and costs, see Transcript of record on file herein pages 1-16; that such prior conviction in said cause number 5607 was used to sustain an enhancement of punishment in said cause number 5731 and could not have been used again in this case without having violated the principal of Former Jeopardy and in violation of Article V, of the Constitution of the United States; also such prior conviction having been used one time prior to enhance the penalty in a criminal case, its use a second time is barred by the *Res Adjudicata* Rule.

This case was duly and timely appealed to the Court of Criminal Appeals, see appeal bond page 16 of Transcript of

record on file herein. The Court of Criminal Appeals affirmed the case, see Opinion page 36-38 of Transcript; Motion for Rehearing in Court of Criminal Appeals was overruled October 23d, 1946, see pages 42-45 for Opinion on Motion for Rehearing and page 45 for Judgment on Motion for Rehearing.

Grounds of Jurisdiction of the Supreme Court of the United States and the Manner in Which the Federal Questions Were Raised.

The Supreme Court of the United States has jurisdiction of this cause under the following laws, to-wit:

Article V of the Constitution of the United States; which reads in part as follows: "Nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

Also the *Res Adjudicata* Rule was violated; a pleading was used to enhance the punishment against this defendant, and such pleading had been used one time prior thereto for the same purpose in a criminal prosecution, using the very identical words in each instance, see pages 1-16 of Record Transcript.

This defendant was twice put in jeopardy by the same identical pleading verbatim and was penalized the first time and paid the penalty in full and then penalized again and the penalty from which this appeal was taken assessed against him, see Record Transcript pages 1-16.

This defendant respectfully would show this Court that he has been twice put in jeopardy for the same offense, and the same matters twice adjudicated against him, and that this raises a Federal question, and that he is a Natural Born Citizen of the United States and is entitled to the protection and benefits of the Federal laws and the Constitution rights guaranteed him by Article V of the Federal

Constitution, and he here and now pleads such rights and Article V of the Federal Constitution in bar to such double jeopardy and double adjudication. The State Courts refused to allow this Constitution right to this defendant and permitted such double jeopardy and double adjudication as above set out.

Points of Error

POINT ONE: Prior convictions may not be used to enhance the punishment in any given case more than once; to give the Statute such an effect would be violative of the principal of former jeopardy.

Statement

The Complaint and Information in this cause alleges two prior convictions, each of them styled State of Texas v. Foster Brown, both in the County Court of Young County, Texas, being cause number 5607 and cause number 5681; they were both used to enhance the punishment in this case, even in the charge the court told the jury the lease or minimum fine was \$400.00 and the maximum fine \$4,000.00, and the maximum jail sentence four years, or both such fine and jail sentence, see record page 6; and the jury fined defendant \$400.00 and gave him 90 days in the County jail and costs of court; judgment was rendered accordingly. On Motion for new trial in the trial court it was duly and timely set up and proved conclusively from the records see Statement of Facts on hearing of motion for new trial, record page 25-36, that one of the prior convictions, to-wit, cause number 5607, had been used one time prior in cause number 5731, in the County Court of Young County, Texas, for the purpose of enhancing the punishment in said cause against this defendant; that the complaint and information against him in said cause number 5731 was read to him, with the said 5607 conviction alleged therein and that he plead

to it; the evidence is conclusive and undisputed that said prior conviction was used in a prior case; it therefore boils itself down to whether or not the State can use a prior conviction more than one time to enhance punishment as it did in this case. There are other points in this case, but the defendant feels that this use of this prior conviction which had been used one time against him before is in violation of Article V of the Constitution of the United States, and denies him a valuable right that is guaranteed him by such constitution, as a citizen of the United States, this allowing him to be twice put in jeopardy of and defending himself twice on the same identical pleading in a criminal case. There is no dispute that this was done, it is admitted and is proven by the record and by the Attorney who used it the first time, and who is assistant County Attorney at this time, it is just a question whether it could have been lawfully done, or whether the Constitution guarantees that he could not be twice compelled to defend himself against the same criminal charge, for the record on this see page 25-36 of the record, this is the record made on the motion for rehearing in the trial court. See pages 36-38 of the Record for the Opinion of the Court of Criminal Appeals which shows that this question was clearly before said Court and that they passed upon it, upholding the trial court; see page 42-45 of this record for the Opinion of the Court of Criminal Appeals which shows they passed upon it again and that this question was properly before said court. See pages 45-46 of the record which shows that a Stay was granted by the Court of Criminal Appeals of Texas, on October 25th, 1946, allowing this defendant 90 days within which to file this his application for Writ of Certiorari in this court. Thus this case is properly before this court on such application to determine whether or not he is entitled to the benefits of Article V of the Constitution of the United States which guarantees to him as a

citizen of the United States that he shall not be twice compelled to defend himself upon the same identical pleading and charge in a criminal case.

Authorities

Article 5, Constitution of the United States:

Texas Penal Code, Article 1.

Texas Penal Code, Article 8.

Constitution of Texas, Bill of Rights, Section 14.

Cothen v. State, 140 S. W. 2nd, 860 (Texas case where Court of Criminal Appeals of Texas held contrary to the holding in this case).

Cothen v. State, 143 S. W. 2nd 958 (followed other case).

Cothen v. State, 145 S. W. 2nd, 886, (followed other case).

Miller v. State, 140 S. W. 2nd, 859, (Texas case holding differently than this case).

Kinney v. State, 84 S. W. 590 (an old Texas case which laid down the rule on this point, which had been followed consistently in Texas, until in this present case, wherein the Texas Court of Criminal Appeals reversed such holding).

Texas Jurisprudence, Vol. 12, page 795, Section 404.

Texas Jurisprudence, Vol. 12, page 533, Chapter XII. (The holdings in this case are different to the holding cited in Texas Jurisprudence, and to the Text of the Law adopted therein).

Of course we rely before this court upon the protection of our Constitution guarantee in Article V, Constitution of the United States, that he shall not be compelled to defend himself a second time on the same identical pleading that had been reduced to a final judgment one time before and the penalty paid in full in a court having exclusive jurisdiction and fully competent in both instances to try said case.

Argument

The question as to whether or not a prior conviction can be used more than one time is purely a question of law; and this case a Federal question, and simmered down a question of whether or not a Constitutional Article such as Article V can be violated and the rights guaranteed a citizen thereunder be denied him, and can he get relief from such denial of such Constitutional right; the principal of former Jeopardy Rule has been flagrantly violated to the prejudice and injury of this defendant, and from which double jeopardy he has appealed to this Honorable Court; cause No. 5607 was used one time against this defendant in cause number 5731, and was used against him again in this cause No. 5790 in the trial court; this is contrary to every rule of law in the books in the State of Texas, and is certainly contrary to Article V of the Constitution of the United States, and the Holdings of the Federal Court on such questions, viz:

U. S. v. Olmstead (D. C. Wash.) 5 F. 2nd, 712, which holds "A judgment is a bar to subsequent prosecution for any offense which could have been proved under the Indictment."

Ballerina v. Aderholt (CCA. 5), 44 F. (2nd) 352, which holds "The Test of determining what is the same offense is whether, if what is set out in the second indictment had been proved under the first, there could have been a conviction."

If it can be used two times to enhance the punishment it can be used three times over or fifty times, there would be no end to the times that a man could have an old prior conviction brought up against him, in other words if the cause No. 5607 could be used in this cause, then cause No. 5607 could be used repeatedly hereafter; in other words the jeopardy rule would be wiped out, for the fact that it

is used in order to get a greater punishment in a criminal case, and is used one time against a defendant in a court of competent jurisdiction, then he has been placed in jeopardy from said prior conviction just as much so as to be tried for an offense twice, and it works on the same principal. To allow such double jeopardy would in effect act as an outright repeal of Article V, of the Constitution of the United States.

Petitioner states that he has mailed a copy of this petition to the Clerk of the Court of Criminal Appeals of Texas, at Austin, Texas, for use by the States Attorney, Mr. Ernest S. Goens, to be by said Clerk delivered to said Attorney for Appellee, the State of Texas, and that a copy has been furnished Mr. Goens, for his use in this case.

WHEREFORE, Petitioner, Foster Brown, respectfully prays the Court that a Writ of Certiorari be granted in this case, and that upon a hearing this Court enter its judgment reversing the judgment of the Court of Criminal Appeals of Texas, and the County Court of Young County, Texas, and rendering judgment in favor of Petitioner; and, in the alternative, judgment be entered reversing the judgment of the Court of Criminal Appeals and the County Court of Young County, Texas, and remanding the cause to the trial court for a new trial.

Respectfully submitted,

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Graham, Texas,

By F. V. HINSON,
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